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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1959.

No. 284

BAKER, OBERMEIER & ROSNER,
Petitioners,

v.

SURFACE TRANSIT, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Second Circuit.

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Second Circuit.

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on May 11, 1959, and on June 8, 1959.

OPINIONS BELOW.

The initial opinions of the Court of Appeals dated May 11, 1959 (2 Cir., 266 F. 2d 862), are printed in Appendix B, pp. 27-35. On that occasion a majority of the Court below (Swan, C. J., dissenting) by reversing that part of the Order of the District Court for the Southern District of New York denied to the petitioners who are lawyers the right to receive compensation for the services they rendered for a creditors' committee during these proceedings. The compensation had been allowed by the District Court in its order made and entered on July 22, 1958. By Order of the Circuit Court of Appeals for the Second Circuit dated June 8, 1959, petitioners' petition for rehearing was denied (Appendix B, p. 36).[1]

JURISDICTION.

The final judgments of the United States Court of Appeals which petitioners seek to review are dated May 11, 1959, and June 8, 1959, and were entered on those days. A petition for rehearing was duly filed May 25, 1959, and rehearing was denied on June 8, 1959. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

1. Whether in a bankruptcy reorganization proceeding the Securities and Exchange Commission (herein referred to as S. E. C.) may assume the role of an appellant and party aggrieved in contravention of Section 208 of the Bankruptcy Act (11 U. S. C., § 608) where neither the reorganized companies nor any other of the parties to

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[1] The record on this petition consists of the Appendices filed in the Court below, by the parties to these proceedings.

the proceeding either before the District Court or in connection with its appeal to the Circuit Court of Appeals take any position in regard to a final allowance granted petitioners by the District Court?[2]

2. Whether the purchase or sale of the securities of a corporation undergoing reorganization by the wife of a member of a law firm which represented creditors in a reorganization proceeding bars the application for allowances of attorney's fees and forfeits the claim for compensation for the services rendered by virtue of Section 249 of the Bankruptcy Act (11 U. S. C., § 649), where all as found by the District Court after a full hearing, the members of the applicant's firm neither owned nor had a beneficial interest in the securities sold or in the proceeds of the sale, nor breached his fiduciary obligations?

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[2] The petitioners, both in their main brief and in its petition for rehearing filed in the Circuit Court below, argued that the right to appeal had been expressly withheld from the S. E. C. by virtue of Section 208 of the Bankruptcy Act (11 U. S. C., § 608). This issue remained unanswered by the Circuit Court.

Petitioners on page 2 of their main brief filed in the Court below stated: "The reorganized companies, the appellants herein, have not, either before the District Court or on this appeal, taken any position with regard to the issues raised by the sale of the adjustment bonds in 1954 by Mrs. Rosner. Despite this fact the S. E. C. is raising the issue as though it were the aggrieved party and the appellant, a role denied it under Section 208, Bankruptcy Act (11 U. S. C., § 608)."

The Circuit Court in its opinions having failed to resolve the issue, petitioners, in its petition for rehearing to the Circuit Court, once again raised that issue where on page 2 of said petition Point 1 was made that "The Securities and Exchange Commission has assumed the role of Appellant and party aggrieved in violation of Section 208 of the Bankruptcy Act (11 U. S. C., § 608)." Discussion of this point was followed by the statement, "This Court in denying compensation to petitioners has permitted the S. E. C. to appeal and become an appellant—a role expressly denied it under Section 208 of the Bankruptcy Act (11 U. S. C., § 608)." After a detailed discussion and argument, the point was concluded with the following statement appearing on page 3 of said petition for rehearing: "It is the contention of the petitioners that by virtue of Section 208, the S. E. C. is precluded from raising issues on appeal other than those being raised or created by the parties who are Appellants in the proceedings."

3. Whether under Section 249 of the Bankruptcy Act (11 U. S. C., § 649) a fiduciary in connection with an application for allowances in a reorganization proceeding is conclusively presumed to have a beneficial interest in the transactions of one close by blood or marriage (in this instance a wife) with the result the fiduciary is charged with violating his duty?

4. Whether under Section 249 of the Bankruptcy Act (11 U. S. C., § 649) the Circuit Court of Appeals has power to reverse the award of attorney fees made to an applicant where the District Court, vested with authority to determine on the facts whether the applicant had breached his fiduciary obligations, in the furtherance and exercise of that authority, finds that the applicant did not breach his fiduciary obligations and makes an award to applicant?

STATUTES INVOLVED.

The pertinent provisions of the Bankruptcy Act are set forth in Appendix A, pp. 25-26.

STATEMENT.

This case arises in a proceeding under Chapter X of the Bankruptcy Act (11 U. S. C., § 501 et seq.) for reorganization of the debtors, wherein an Order was made by the District Judge, before whom the proceedings were pending, granting a final allowance of $7,000.00 to Baker, Obermeier & Rosner, co-counsel for a creditors' committee (Tinker Committee), over the objections solely raised and recommendations made by the Securities and Exchange Commission for the disallowance of the entire claim for compensation under Section 249 of Chapter X of the Bankruptcy Act (11 U. S. C., § 649) because of the sale in 1954 by Mrs. Miriam R. Rosner (wife of Oscar S. Rosner, a

member of the petitioners, Baker, Obermeier & Rosner) of $5,000.00 in principal amount of Third Avenue Railway Company adjustment bonds, which she had acquired with her own funds in 1945, approximately four years before the petition for reorganization of the debtors was filed.

The reorganized companies, by permission of the United States Court of Appeals for the Second Circuit, appealed from the allowance Order of the United States District Court for the Southern District of New York made by Judge Dimock on July 22, 1958.[3] The sole basic contention

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[3] In its application for leave to appeal from the order of the District Court awarding final allowances, no reference was made by the reorganized companies as to the right of petitioners to receive compensation. In fact the memorandum opinion of the District Court dated February 6, 1958 (Appendix A, pp. 25-26) on the application of Oscar S. Rosner for compensation was not annexed to the motion papers as either an exhibit or an appendix. The basic complaint of the appellant was that in the aggregate the District Court allowed too great an award for fees. The S. E. C. in its memorandum not only supported the reorganized company in its application on the grounds relied upon therein but also urged that the application be granted because "The district court felt that Section 249 did not bar compensation by reason of two decisions of this Court, i. e., *Berner v. Equitable Office Bldg. Corporation*, 175 F. 2d 218 (1949), and *Nichols v. Securities and Exchange Commission*, 211 F. 2d 412 (1954). We believe that the determination should have been governed by more apposite holdings in other circuits." See e. g. *In re Midland United Co.*, 159 F. 2d 340 (C. A. 3, 1947), and *Securities and Exchange Commission v. Dumaine*, 218 F. 2d 308 (C. A. 1, 1954)."

However, the S. E. C. recognized that it was assuming the role of an appellant in urging the granting of the application when it stated on page 4 of its memorandum, "A full review of the allowance awards would permit consideration of a determination by the district court of an important question in Chapter X administration not specifically raised by the reorganized company's application," and on page 5 where the statement is made that "The Commission will urge, if the appeal is allowed, that this determination should be reversed on the grounds that (1) the applicant is disqualified by virtue of the sale of securities by his wife with his knowledge and in circumstances similar to those shown here; (2) the *Berner* and *Nichols* cases do not require a contrary result; and (3) to hold otherwise would seriously weaken the bar to trading in securities and thus permit its easy circumvention."

of the Appellants, as aggrieved parties, in connection with their appeal was that the District Court erred in awarding the aggregate amount of $2,068,000.00. This sum it felt so excessive as to jeopardize the future financial soundness of the reorganized public utility companies. The appellants also contended that the total amount which they could afford to pay and justly bear was not substantially more than $1,600,000.00, and that in no event should the fees and disbursements exceed $1,818,000.00, the aggregate amount recommended by the Securities and Exchange Commission. No issue was raised as to the right of the petitioners herein to the award made to them by the District Court.

The reorganized companies had not, either before the District Court or on the appeal to the Circuit Court, taken any position with regard to the issue raised by the S. E. C. as to the sale of the adjustment bonds in 1954 by Mrs. Rosner (A. 171).[4] Despite this fact the S. E. C. assumed the role of an appellant and party aggrieved, in violation of Section 208 of the Bankruptcy Act (11 U. S. C., § 608) and on the appeal raised the issue of the sale as though it were the aggrieved party and thereby made itself the appellant. No issue was raised nor were any objections urged in this regard by either the reorganized companies or by any other party to these proceedings, either in the District Court or on the appeal to the Circuit Court.

Petitioners are aware of the policy of this Court to limit not alone the granting of petitions for certiorari, but also the filing thereof by the members of the Bar. Section 249 (11 U. S. C., § 649) has never been construed by this Court

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[4] References to Appendix to Brief of the Appellants, The Reorganized Companies filed with the Circuit Court. Counsel for the reorganized company in discussing the application for allowances filed by the petitioners herein stated: "We have not taken any position with regard to the issues raised by the sale of adjustment bonds in 1954 by Mr. Rosner's wife."

within the framework of the issues here urged. The smallness of the amount involved may lead one to conclude that these issues are not important. The principles involved are more important than money. What is most important however is whether the statute involved serves as a bar to the recovery of compensation by a lawyer for services honorably rendered, as found by the District Judge, simply because the lawyer's wife wishes to sell securities issued by the company in reorganization though she bought them four or more years before the Court took judicial custody of the debtor. May the United States Circuit Court reverse the District Court in its holding that compensation is allowable since there has been no breach of fiduciary duty where the facts are accepted by the Circuit Court and support the conclusion of the District Court? We submit No!

Just as true as it is that the services of the S. E. C. merit respect and recognition, so is a member of the Bar entitled to respect and judicial protection against an unwarranted construction of the statute here involved which misconstruction requires the conclusion that a mere husband and wife relationship visits upon a lawyer the judicial consequence of a breach of fiduciary duty.

FACTS.

At the time a creditors' committee (Tinker Committee) was seeking the approval of the S. E. C. for the further solicitation of authorizations by said Committee, all available data was submitted to that agency's New York Office as to the securities of owners of Third Avenue Railway adjustment bonds who had previously authorized the Committee to act for them.

The information supplied the S. E. C. in July, 1955, revealed that Mrs. Miriam R. Rosner (who had been one

bondholder, among many who gave authorization to the committee), wife of Oscar S. Rosner, a member of the petitioners' firm, has sold on October 21, 1954, $5,000.00 in principal amount of Third Avenue Railway Company adjustment bonds which she had purchased with her own funds in September, 1945,[5] and were owned by her and registered in her name at the time of said sale. Mr. Rosner supplied the S. E. C. with all of the details as to the purchase in 1945 by Mrs. Rosner and the subsequent sale by her and for her account, on October 21, 1954, of the securities.[6]

Mr. Rosner at no time discussed with Mrs. Rosner, any phase of these proceedings, nor did he in any way have anything to do with her decision to sell the Third Avenue adjustment bonds she owned. She relied completely upon the advice of another to whom a list of security holdings were submitted, as appears by the following facts adduced at a hearing held at the New York regional office of the Securities and Exchange Commission.

A Memorandum showing the securities owned by Mrs. Rosner and himself was submitted to Mr. Irving Kahn, of the brokerage firm of J. R. Williston & Co., who thereafter recommended that Mrs. Rosner sell the Third Avenue adjustment bonds as well as some shares in Brockway Motors Corporation and some Grand Union Company preferred stock. This recommendation was accepted by Mrs.

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[5] There were produced for the S. E. C. the confirmations to Mrs. Rosner of the purchase of these bonds.

[6] In the Fall of 1954, the suggestion was made that a Mr. Irving Kahn of the stock exchange firm of J. R. Williston & Co. of New York City advise Mrs. Rosner as to her investments. Mrs. Rosner had heard of Mr. Kahn because of the social relationship that existed between Mr. and Mrs. Rosner on the one hand and the widow of a testator under whose Will Mr. Rosner was serving as co-trustee. The widow was quite enthusiastic about the capacity and good judgment of Mr. Kahn in financial matters.

Rosner, since she was anxious to follow Mr. Kahn's advice. She received no advice whatsoever from Mr. Rosner, either as to the sale or any purchases to be made with the proceeds of such sale. The bonds came from the individual vault of Mrs. Rosner. The proceeds of sale were received by Mrs. Rosner and deposited in her own individual checking account. Mr. Rosner had no power of attorney over Mrs. Rosner's checking account. It may be deemed appropriate to indicate that the Third Avenue adjustment bonds, when purchased by Mrs. Rosner in September, 1945, at 48, were sold in October, 1954, at the price realized of 34⅞, after which these bonds then sold in the market at approximately 42.[7]

Mr. Rosner represented to the District Court, in his firm's petition for an allowance of attorneys fees, that he never supplied any information to his wife as to the reorganization proceedings, either before or after such sale by her; that the bonds were purchased by Mrs. Rosner with her own funds and were sold solely and wholly on the

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[7] Mr. Rosner produced two confirmations from Bear Stearns & Company, of 1 Wall Street, New York City, showing the purchase for Miriam R. Rosner of 4M Third Avenue Railway 5s of 1960, at a price of 48, and 1M of the same security at the same price, making a total of $2,412.50. The carbon copy of a letter signed by Mr. Rosner addressed to Bear Stearns & Company dated September 18, 1948, encloses Mrs. Rosner's check for $4,116.72, in payment for 5M Third Avenue Railway adjustment 5s of 1960 and other securities, and requests the forwarding of the securities to Miriam R. Rosner, to be registered in her name at her then address at 321 Beechmont Drive, New Rochelle, New York (A. 433).

Mr. Rosner also produced the carbon copy of Mrs. Rosner's income tax return for the year 1947, reflecting an item under "Interest Received" Third Avenue Railway, the sum of $124.00. By letter dated May 13, 1957, Mr. Rosner advised the S. E. C. that for the year 1954, both he and Mrs. Rosner had filed a joint income tax return which reflected under the schedule of Capital Gains and Losses, under long term for Miriam R. Rosner, a loss of $685.70, by virtue of the sale of the 5M Third Avenue adjustment bonds on October 21, 1954 (A. 437).

advice of another; that he was in no way consulted by nor did he advise his wife on the subject; that he was in no fashion guilty of the breach of any fiduciary duty nor in any respect failing in any loyalty to his professional obligation both to the District Court and to all the creditors interested in the proceedings. Petitioner further advised the Court that Mr. Rosner has maintained respect for the integrity not alone of his wife but the individuality as well of each member of his family, and that Mrs. Rosner has maintained her own savings and checking accounts for all of the years of her marriage.[8]

The bonds having already been sold by Mrs. Rosner, Mr. Rosner acting as a clerical and ministerial aid to his own wife, wrote to Mr. Kahn confirming the sale by Mrs. Rosner and reminded Mr. Kahn that "The Third Avenue bonds and Brockway shares should be sold for the account of Miriam R. Rosner, c/o my office." In addition, a check for the proceeds of the sale which was payable to Mrs.

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[8] Pursuant to a notice of examination served by the S. E. C., the depositions of Irving Kahn and John Utess, a bookkeeper of J. R. Williston & Co., were taken. Mr. Kahn testified that he was requested by Oscar S. Rosner to examine a list of securities owned, individually by Mr. Rosner and Mrs. Rosner, and to advise or to recommend to each with respect to the retention or sale of any of the securities, or to make such other recommendations as his judgment dictated. He subsequently made recommendations to each individual in connection therewith. Based upon the individual recommendations made to both, and upon the telephone conversations with each as to the securities each owned, Mrs. Rosner ordered the sale of $5,000.00 of Third Avenue Railway adjustment bonds and the other shares Mr. Kahn suggested she sell. The securities were sold for her own account. The proceeds when received were credited to her own account.

Mr. John Utess, the bookkeeper, testified that the stock broker's books showed the sale of $5,000.00 of the Third Avenue Railway bonds for Miriam R. Rosner, and the check for the sale proceeds made out and forwarded to her was deposited in her account at the Chemical Corn Exchange Bank. Mr. Rosner stated that he and his wife maintained separate checking accounts at that bank and that he had neither power of attorney nor signature power.

Rosner was sent to the office of Oscar S. Rosner. The check was endorsed and deposited into Mrs. Rosner's bank account.

In the District Court the S. E. C. took the position that the mere existence of the relationship of husband and wife presumed that not only had the husband a beneficial interest in the transactions of his wife, but also that the mere relationship of husband and wife is adequate to establish that the fiduciary favors his wife.

The District Judge, in his Memorandum on the application of petitioners for compensation for the services rendered by the partner most active, in holding that the Second Circuit in its construction of Section 249 (11 U. S. C., § 649), the fiduciary is not disqualified from compensation by transactions in which he had no beneficial interest and that the claimant was not conclusively presumed to have a beneficial interest in transactions of his wife found that, in the absence of such a conclusive presumption, the S. E. C. had not sustained the burden of proving that the claimant had a beneficial interest either in the securities sold or in the proceeds of the sale. While the District Court also properly found that the claimant, admittedly knew of the sale and participated in the mechanics of the transaction, it regarded these admissions taken with the evidence of Mrs. Rosner's separately owned securities and separate bank account, not to warrant an inference that the claimant had a beneficial interest directly or indirectly. The District Judge held, therefore, that Section 249 (11 U. S. C., § 649) did not result in the forfeit of the right to compensation.

The District Judge, carefully examining and analyzing the facts to ascertain and determine if a breach of trust had been committed by the claimant, further rejected the

contention made by the S. E. C. that the mere relationship of husband and wife is enough to establish conclusively that the fiduciary favored his wife. The Court, while holding that the relationship is only evidence that the husband has favored his wife, further found that regardless upon whom the burden may be, the claimant had sustained the burden of showing no favoritism. The Court found that:

> Mrs. Rosner had owned the bonds long before her husband became involved in the proceeding as attorney for bondholders. It is true that he knew of her sale during his incumbency as such attorney; indeed, he transmitted the bonds to the broker and received the proceeds, although it is clear that he turned them over to his wife. Mr. Kalin, the broker, testified that he advised Mrs. Rosner to sell these and other securities and that he consulted independently with her, but that the final letter advised of the sale was sent through the claimant and in fact contained advice on other securities belonging to him. While there was thus opportunity for advice to his wife, the claimant states that he did not advise his wife as to the Third Avenue bonds and that he did not disclose to her any information relating to the reorganization proceedings.
>
> Transactions by the wife of a fiduciary require careful scrutiny by the courts to enforce the high standards required by the purpose of Section 249, even in cases not within the strict terms of the section and not within its absolute bar to all compensation. Berner v. Equitable Office Bldg., supra, p. 222. I have therefore examined the evidence as to this sale with especial care and I am satisfied that the claimant did not in any way favor his wife with advice as to the sale or with any information as to the reorganization proceedings that would afford her opportunities not open to other beneficiaries.

Because of its recommendation that the petition for allowance of Baker, Obermeier & Rosner be denied, the S. E. C. initially made no valuation of the services rendered by Oscar S. Rosner on behalf of petitioners Baker, Obermeier & Rosner. The District Court, after ruling favorably on petitioners' right to allowance, sought the advice of the S. E. C. as to the amount to be granted. At a hearing subsequently held on February 28, 1958, the S. E. C. recommended that an allowance of $7,000.00 would represent fair and reasonable compensation. This was the sum allowed by the order of July 22, 1958.

The reorganized companies, by permission of the United States Court of Appeals for the Second Circuit, appealed from the allowance Order of the United States District Court for the Southern District of New York made by the District Judge on July 22, 1958. The basic contention of the Appellants (the appellants as aggrieved parties) in connection with their appeal, was that the District Court erred in awarding an aggregate amount to all applicants, which they felt was so excessive as to jeopardize the future financial soundness of the reorganized public utility companies. No issue was raised by the true appellants—the reorganized companies—as to the right of the petitioners herein to the award made to petitioners by the District Court.

On neither the application for leave to appeal to, nor on the appeal before the Circuit Court for the Second Circuit, was issue raised or recommendations made as to the right of the petitioners to receive compensation, either by the reorganized companies or by any of the other parties in these proceedings. The sole issue raised in this regard was by the S. E. C., which contended that your petitioners were precluded from an award of attorney fees because Mrs. Rosner had traded in the debtor securities with the knowledge of her husband, who is a member of petitioners' firm.

On the appeal, the United States Court of Appeals (one member of the Court dissenting) reversed the Order granting an award to your petitioners and a timely petition for rehearing filed by your petitioners was denied.

REASONS FOR ALLOWANCE OF WRIT.

Applications for allowances of compensation to attorneys for creditors of debtor corporations undergoing corporate reorganization is a matter of recurring importance in the administration of reorganization proceedings. In reversing an Order awarding compensation to the petitioners herein, the Circuit Court in effect introduced amendments to two sections of the Bankruptcy Statute, to wit: Section 208 (11 U. S. C., § 608) which denies the right of the S. E. C. to appeal, and Section 249 (11 U. S. C., § 649) which pertains to a petition for allowances and reached the determination in direct conflict with prior decisions of the same Circuit and of the First, Third and Fourth Circuits.

The decision in effect amends Section 208 (11 U. S. C., § 608) of the Bankruptcy Act by removing the bar to the right of the S. E. C. to become an appellant and thereby assume a role which is expressly denied to it under the section. The S. E. C., by virtue of Section 208, does not have the status of an appellant and on appeal may only make recommendations and take positions in connection with the matters which are in issue and have been raised by other parties to the proceedings. Section 208 clearly provides that the S. E. C. in any proceeding under Chapter X may not appeal or file any petition for appeal.[9]

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[9] Section 208 (11 U. S. C., § 608) provides, "* * * The Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding. * * * but the Commission may not appeal or file any petition for appeal in any such proceeding."

Also, the decision below, in effect, amends Section 249 of the Bankruptcy Act, by changing it so as now to provide that a husband is conclusively presumed to have a beneficial interest in the transactions of his wife and consequently is barred from receiving compensation for services rendered in a reorganization proceeding, even though the applicant neither owned nor had a beneficial interest in the securities sold or in the proceeds of the sale and did not breach his fiduciary obligations.[10]

Furthermore, the decision of the Court below is in conflict with the doctrines in the following cases:

S.E.C. v. Dumaine, 1st Cir. (218 F. 2d 308) certiorari denied Dumaine v. S.E.C. (349 U. S. 929);

Berner v. Equitable Office Building Corp., 2 Cir. (175 F. 2d 218);

Nichols v. S.E.C., 2 Cir. (211 F. 2d 412);

In re Midland United Co., 3rd Cir. (159 F. 2d 340);

In re Central States Elec. Corp., 4th Cir. (206 F. 2d 70) certiorari denied, Henis v. Egan (346 U. S. 899).

As the Circuit Court below, in the instant case stated in its opinion, the sanctions imposed by Section 249 are "to eliminate the serious abuse of inside information, which had long been existent in equity reorganizations." The statute, however, is being read by some of the lower Federal Courts, including the Circuit Court below, that under Section 249 of the Bankruptcy Act (11 U.S.C. § 649) the fiduciary is disqualified from compensation by transac-

[10] Section 249 (11 U. S. C., § 649) provides: "* * * No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims, or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the Judge, been otherwise acquired or transferred."

tions in which he had no beneficial interest even where there had been no abuse of any inside information, on the theory that a husband is conclusively presumed to have a beneficial interest in the transactions of his wife. This is the only and irresistible conclusion to be drawn from the majority opinion below, as pointed out by the dissent below of Swan, C. J.

The present opinions present the opportunity for a meaningful review and clarification of the treatment properly to be afforded the fiduciary who, by reason of the transactions of people related to the fiduejary by blood or marriage, is being precluded by the Court from receiving compensation in reorganization proceedings as a result of transactions in which the fiduciary has no interest, over which he has no control and in connection wherewith commits no breach of his fiduciary duties.

The Conflict Between Circuits.

Berner v. Equitable Office Building Corp., 2 Cir., 175 F. 2d 218, presented a situation which unquestionably involved a breach of a fiduciary relationship in connection with reorganization proceedings. In that case, the attorney had given advice to and consulted with his brother-in-law, who then dealt in the securities of the debtor company. There is no question that because of the advice and consultation given by Berner, his brother-in-law dealt in the securities of the company. The sole issue then was whether or not the attorney had an interest in the brotner-in-law's shares, and since the S. E. C. had failed to prove that there was such an interest, Section 249 (11 U. S. C., § 649) was held not to forfeit Berner's claim for compensation, but merely diminished the allowance to which the fiduciary would have been entitled, had there been no breach.

Nichols v. S. E. C., 2 Cir., 211 F. 2d 412, involved transactions by the wife and daughter of an attorney who was applying for a fee for services rendered in a proceeding under Section 11 E of the Public Utility Holding Company Act.[11] While it is true that the claimant in that case had no knowledge of the transactions of his wife and daughter, the Court reiterated the rule that a claimant may not be disqualified without proof that he had an interest in the securities. The Court therefore allowed the compensation. The Court in that case was clearly faced with the problem as to whether the mere relationship of husband and wife gave rise to any presumptions, conclusive or otherwise, that the claimant had a beneficial interest in the transactions of his wife.

The S. E. C. in its Brief, which was submitted and filed in connection with the appeal herein which was taken from the Order of the District Court to the Court of Appeals, clearly recognized the conflict that exists between the various Circuits. Commencing on page 35 of the Brief the following verbatim analysis of the Statute and the various cases is made:

> "Section 249 of the Bankruptcy Act has been uniformly held to preclude an award to an attorney whose wife has traded in the debtor's securities with

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[11] This Court in the Nichols v. S. E. C. case, supra, equated Rule U-62 (g) (2) with Section 249. Rule U-62 (g) (2), 17 CFR 250.62 (g) (2) reads as follows:

> "No securities of the company . . . in reorganization, . . . shall be bought or sold by or for the account of (whether as principal, agent, trustee or otherwise) any of the persons specified in clauses (A) to (E) below, or in any transaction in which any such person has any beneficial interest, direct or indirect; . . .
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> * * * * * * *
>
> "(B) Any person connected with any committee or other organization formed to act under the authorization so solicited: . . ."

his knowledge. In re Central States Electric Corp., 206 F. 2d 70, 71-72 (C. A. 4, 1953); In re Midland United Co., 159 F. 2d 340 (C. A. 3, 1947); In re Inland Gas Corp., 73 F. Supp. 785, 791-792 (E. D. Ky., 1947); and cf. S. E. C. v. Dumaine, 218 F. 2d 308, 313-316 (C. A. 1, 1954).

"The Central States case, supra, involved the fee of one O'Brien whose firm represented a preferred stockholders committee. After the organization of the committee O'Brien's wife sold 800 shares of the preferred stock. The Court of Appeals for the Fourth Circuit, in denying leave to appeal from a determination that O'Brien was precluded by §249 from receiving compensation, said 206 F. 2d at 72:

> 'We agree with the court below that the making of an allowance to O'Brien was precluded by the sale of stock by his wife.'

"The Court of Appeals for the Third Circuit in the Midland United case, supra, affirmed the judgment of the district court denying compensation to an attorney for a protective committee whose wife had engaged in several transactions in the securities of the debtor upon the basis of Section 249, as well as upon the general equitable powers inherent in the court of bankruptcy. The Court said (159 F. 2d at 347):

> 'It will be noted that we have regarded Mrs. Evans' transactions as being in the same category as those of Mr. Evans. While she financed her securities dealings entirely with her own funds, Mr. Evans candidly stated that she engaged in the various transactions with his 'entire approval and knowledge.' Under such circumstances it is clear that the bankruptcy court was justified, in the exercise of its proper powers, in extending the

principles applicable to the conduct of the fiduciary to the fiduciary's wife.'

"The Midland case was relied upon in the Inland case, supra, where it was stated (73 F. Supp. at 791, 792):

'Allowance to H. W. Bowers on account of his services on behalf of the Early group is precluded by the provisions of Sec. 249 on account of the fact that his wife Emma C. Bowers bought and sold certain Inland debentures during the proceeding and was a member of the group represented.'

"The Dumaine case, supra, decided by the Court of Appeals for the First Circuit, involved this Commission's Rule U-62 (g) under the Public Utility Holding Company Act of 1935, a rule that is substantially similar to Section 249. The Court stated (218 F. 2d 315):

'The specific question before us is whether the Rule is violated when during a reorganization the wife of a member of a stockholders' committee, with her husband's knowledge, sells shares of stock represented by her husband's committee which she purchased with her own personal funds before reorganization, and uses the proceeds of the sale to reduce a loan incured in the purchase of a family residence.' "

The S. E. C. was completely aware of the conflict existing in the various Circuits when in its brief below it then attempts to reconcile the Nichols case and the Berner case and concludes with the following:

"Accordingly we believe that the Nichols and Berner cases did not compel the results reached by the Court below and that in relying upon those cases

rather than upon the cases in other Circuits cited above which are directly in point, the District Judge erred."

This latter statement by so important an agency as the S. E. C. in the field of reorganization demonstrates a clear admission of the conflict which exists in the various Circuits.

Conflict in Opinion in the Same Circuit Court.

Also, not only is there a conflict in the various Circuits but also among the cases in the Circuit of whose judgment review is sought as to the Rule to be followed in reorganization proceedings.

In the decision rendered by the Circuit Court below, that Court at p. 868 stated that: "The language of Berner v. Equitable Office Bldg. Corp., 2 Cir., 175 F. 2d 218, and Nichols v. S. E. C., 2 Cir., 211 F. 2d 412, 416-417, on which the Court below relied, is perhaps broader than those decisions warrant." However, the fact is that the decision in the case at bar so sharply restricts rather than broadens the doctrine of those two cases. Unlike the Berner case where it was found a breach had occurred, the District Court specifically found in the instant case that the fiduciary did not breach his obligations and did not have any beneficial interest in the securities of his wife, yet the Court of Appeals though approving those findings denied petitioners' compensation. In the Berner case, supra, the fiduciary was allowed compensation even though he was held to have breached his fiduciary obligations. In the Nichols case, supra, the Court was clearly faced with the proposition whether the mere relationship of husband and wife gave rise to any presumption, conclusive or other-

wise, that the claimant had a beneficial interest in the transactions of his wife. The Court in its opinion, however, held that the two members of the committee were entitled to the compensation, despite the fact that the wife and daughter of one member and a sister of another member purchased and sold shares of the corporation undergoing reorganization. The only distinction between that case and the case at bar is that the petitioner herein, while having had knowledge of his wife's dealings, had no beneficial interest therein, while in the Nichols case, the applicant had neither knowledge nor a beneficial interest.

The Circuit Court on page 868 of its decision accepted the findings of the District Court to the effect that—

> "Judge Dimock found on undisputed evidence that Mrs. Rosner's decision to sell was based entirely on the advice of her investment broker, and that no inside information possessed by Mr. Rosner entered into the decision."

Since this is the fact, there could not possibly be any breach of the fiduciary relationship, for the intention of Section 249 of the Bankruptcy Act is that as stated by the Circuit Court on page 868 that—

> "in § 249 of the Bankruptcy Act Congress clearly intended drastic results and thought them necessary to eliminate the serious abuses of insider information which had long been existent in equity reorganizations."

There must be clarification of this problem, as to which conflict in decisions and confusion exists.

The petitioners herein have been denied compensation under a Statute designed to prevent an abuse of insider information which the District Court found had not been

committed as to the transaction in which the member of the applicants' firm had no beneficial interest and over which he had no control. Query on what basis was compensation denied and the District Judge reversed?

The Berner case held that in the situation where a fiduciary breached his obligations and gives inside information to a brother-in-law, provided the fiduciary has no beneficial interest, he is nonetheless entitled to compensation, on a diminished basis. The Nichols case rejects the conclusive presumption that a husband has a beneficial interest in the transactions of his wife. A distinction is now made by providing an exception to such a rule to the effect that if the husband is unaware of the dealings of his wife then there is no conclusive presumption. Query, is the presumption to apply when the fiduciary is aware of the dealings of his wife and the Court specifically finds on undisputed evidence that the wife's decision to sell was based entirely on the advice of another and that no inside information possessed by the fiduciary entered into the decision with the accompanying result that there could not possibly be any breach of the fiduciary relationship?

The conflict in the Second Circuit is succinctly and cogently pointed up by the dissenting opinion by Swan, C. J., in the Court below in this case at 868 in which he stated:

> "I disagree with my brothers' decision as to disqualification of the firm of Baker, Obermeier & Rosner. It is my understanding, as it was Judge Dimock's, that the rule in this circuit is that under § 249 the fiduciary is not disqualified for compensation by transactions in which he had no beneficial interest, and that he is not conclusively presumed to have a beneficial interest in the transactions of his wife. Judge Dimock gave the matter very careful considera-

tion. For the reasons stated in his opinion I think the award to Baker, Obermeier & Rosner should be allowed to stand.

"In other respects I concur in the opinion of my brothers."

Thus there currently exist decisions in the Circuit Court for the Second Circuit which hold:

1. A breach by a fiduciary, where a brother-in-law is involved, does not deprive him of compensation provided he has no beneficial interest.

2. Where a wife and daughter trade in the securities of a debtor corporation without the knowledge of the fiduciary, no breach is committed and no conclusive presumption exists and the fiduciary is entitled to compensation.

3. Where a wife of the fiduciary deals and trades in the securities of the debtor with the knowledge of the fiduciary, and even though the Court finds there has been no breach by the fiduciary, a conclusive presumption arises that the fiduciary has a beneficial interest in the transactions of his wife and hence compensation is denied.

Query. Are the decisions which exist within the same Circuit based on equitable considerations in connection with the applications for allowances where members of the fiduciary's family deal in the securities of the debtor corporation undergoing corporate reorganization? In view of the extensive holdings by women who have means of their own in companies which are in corporate reorganization and are wives of fiduciaries, these large and important public questions to which lower courts are furnishing answers in conflict with applicable decisions of their own Circuit and the other Circuits should be resolved. Also, the public interest and importance of this case does not lie in the number of instances in which the questions here

presented may arise; but rather in the impact which it will have, if allowed to stand, on the application of settled and definite principles of bankruptcy administration.

CONCLUSION.

For the foregoing reasons the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Statutory Provisions.

The following provisions of the Bankruptcy Act (52 Stat. 840, 11 U. S. C., § 1 et seq.) are pertinent to the questions presented by this petition.

Section 208 (11 U. S. C., § 608). Intervention of Securities and Exchange Commission.

The Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file a notice of its appearance in a proceeding under this chapter. Upon the filing of such a notice, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding, and shall be deemed to have intervened in respect of all matters in such proceeding with the same force and effect as if a petition for that purpose had been allowed by the judge; but the Commission may not appeal or file any petition for appeal in any such proceeding. July 1, 1898, c. 541; § 208, as added June 22, 1938, c. 575, § 1, 52 Stat. 894.

Section 249 (11 U. S. C., § 649). Statement of Claims or stock acquired or transferred after commencement of proceeding.

Any persons seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or reimbursement shall be allowed to any

committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred. July 1, 1898, c. 541, § 249, as added June 22, 1938, c. 575, § 1, 52 Stat. 901.

APPENDIX B.

Decision of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS
for the Second Circuit.

No. 263—October Term, 1958.

(Argued April 15, 1959. Decided May 11, 1959.)

Docket No. 25474.

Surface Transit, Inc., et al.,

Appellants,

v.

Saxe, Bacon & O'Shea et al.,

Appellees.

In re Allowances in Estate of Third Avenue Transit Corporation,

Debtor.

Before:

Clark, Chief Judge,
and Swan and Moore, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Edward J. Dimock, Judge.

Surface Transit, Inc., and others appeal from orders making final allowances to counsel in the reorganization proceedings of Third Avenue Transit Corporation and its subsidiaries. Orders affirmed, modified, or reversed in accordance with the opinion.

Clark, Chief Judge:

This is the final round in the Chapter X reorganization of the Third Avenue Transit Corporation, a common carrier of passengers, and its subsidiaries instituted by the filing of an involuntary petition on October 25, 1948. The debtor at that time was enmeshed in what seemed to be insoluble problems involving limitations on the fares it could charge, heavy wage demands of its employees, and franchise tax demands of New York City. The parties to this appeal are in near unanimity that the reorganization was unusually successful in achieving a workable solution of these problems and in creating reorganized companies of considerable financial strength.[1] Amidst this genuine glow of success it is indeed difficult for any court or agency dispassionately to evaluate the several applications for compensation filed below. For nearly all the participants richly merit the heartfelt thanks of the court and the public, as well as those of the particular group or interest their efforts may have more directly benefited.

The granting of allowances, however, involves a more complex amalgamation of considerations which can be only imperfectly sketched out for application in future cases. Economy of administration, the burden the estate can safely bear, the value of the services to it, the duplication of service by many counsel representing the same interest, and the reasonableness and fairness of the compensation to each applicant are all steps along the way to a final determination. **Finn v. Childs Co.**, 2 Cir., 181 F. 2d 431; **Newman & Bisco v. Realty Associates Securities Corp.**, 2 Cir., 173 F.

[1] The affairs of this debtor have been before the court in many aspects. See, e. g., *In re Third Avenue Transit Corp.*, 2 Cir., 192 F. 2d 971; *In re Third Avenue Transit Corp.*, 2 Cir., 198 F. 2d 703; *In re Third Avenue Transit Corp.*, 2 Cir., 222 F. 2d 466; *In re Third Avenue Transit Corp.*, 2 Cir., 230 F. 2d 425; *In re Third Avenue Transit Corp.*, 2 Cir., 233 F. 2d 310; *In re Third Avenue Transit Corp.*, 2 Cir., 238 F. 2d 665, certiorari denied *Woodfson v. Doyle*, 352 U. S. 1031; *Johnson Fare Box Co. v. Doyle*, 2 Cir., 250 F. 2d 650.

2d 609; **In re Porto Rican American Tobacco Co.**, 2 Cir., 117 F. 2d 599; **In re Paramount Publix Corp.**, 2 Cir., 85 F. 2d 588, certiorari denied **Palmer v. Paramount Pictures**, 300 U. S. 655. And the recommendations of the Securities and Exchange Commission, representative of the public interest, are entitled to great weight. **Scribner & Miller v. Conway**, 2 Cir., 238 F. 2d 905; **Finn v. Childs Co.**, supra, 2 Cir., 181 F. 2d 431. Ultimately, however, the court's determination must be made on the facts and circumstances of each case.

Some forty-five applications for compensation were filed in the instant proceedings below, requesting over $4,000,000 in fees and disbursements. While on the record before us we cannot say that Judge Dimock's aggregate allowance of $2,028,504.73 is more than the reorganized companies can safely bear, in a variety of respects we are constrained to disagree with specific awards made by the court below. We shall discuss the modifications we are ordering; in the matters not discussed the allowances are affirmed. And we shall limit our discussion to a brief exposition of our substantial reasons assuming familiarity with the comprehensive opinion of the district court.

In any reorganization the trustee and his counsel normally bear by far the largest burden of any of the participants. This was particularly true here, where fare, wage and tax rates facing the debtor had first to be modified before any readjustment of its financial structure would be of value. But on the other hand the compensation of these participants was always assured, and not contingent on success, as, for example, that of bondholders' representatives largely is; and much of the total time logged by trustee's counsel was in the performance of essentially routine work actually done by firm associates. We affirm the district court's award to trustee Lehman and his successor Doyle, and reduce the award of $900,000 granted trustee's counsel Saxe, Bacon & O'Shea to the amount suggested by the S. E. C., namely, $800,000.

The district court awarded The Hanover Bank, trustee of the Refunding Mortgage, $35,000—a substantial increase over the Commission's recommended award of $20,000. Although it considered the same factors as did the Commission in making its recommendation, the court also expressed the view that the bank's charge to a private client for the extraordinary services it rendered in this reorganization would be in the neighborhood of $70,000. Giving full weight to this holding, we are yet constrained to conclude that the increase granted below was overgenerous. We reduce this award to $30,000.

Because of their great assistance to the court, Judge Dimock also granted awards substantially in excess of the S. E. C.'s recommendations to Kelley, Drye, Newhall & Maginnes, counsel to the indenture trustee, to Edward M. Garlock, and to counsel for the Amott Committee, Messrs. Seligson, Burke, and Yohalem. While neither the Commission nor the reorganized companies on this appeal depreciate the value of these counsel's services, yet in view of the degree of duplication the Commission found in the efforts of the bondholders' representatives we must hold that the court's increases of the Commission's recommended allowances, ranging from 30% in the case of Mr. Garlock to 50% to Mr. Seligson and his associates, were excessive. We award the Kelley firm $117,500, Mr. Garlock $132,500, and Mr. Seligson **et al.** $125,000.

The allowance to Garlock raises another problem brought us by the appeal of Hays, St. John, Abramson & Heilbron. This firm was co-counsel for petitioning creditors, along with Garlock and, for a short time before he died, Mr. Robert Irving Lennox, whose estate also received an award. Prior to filing the petition the Hays firm and Garlock entered into an oral agreement to share equally in such compensation as they received from the reorganization. A falling out shortly occurred between them, however. While Garlock carried a substantial burden throughout the reor-

ganization, the Hays firm, with the exception of a few instances, merely held itself ready to give assistance to Garlock, should he have required it. The trial court found that the oral agreement between them as to compensation clearly contemplated an equal division of work as well as of compensation. As this did not occur we see no error in the award of separate compensation to each. Clearly the court has the power to do so. **Leiman v. Guttman,** 336 U. S. 1; **Brown v. Gerdes,** 321 U. S. 178; **Woods v. City Nat. Bank & Trust Co. of Chicago,** 312 U. S. 262. And the allowance of $10,000 granted to the firm seems fair and reasonable compensation for the services it actually rendered the estate.

The Estate of Robert Irving Lennox was awarded $7,500 for Mr. Lennox's short service as co-counsel to petitioning creditors with Mr. Garlock and the Hays firm. This was the sum recommended by the S. E. C. Undoubtedly the estate is somewhat at a disadvantage in assembling records as to the work done by its decedent. But we cannot allow an award based on speculation to stand; and the present award is excessive compensation for Mr. Lennox's limited proven activity. Hence we are compelled to reduce this allowance to $2,500.

Similarly the Commission's own description of the services performed by Murphy, Block, Sullivan & Sawyer, counsel for the O'Connell Committee—yet another committee of refunding bondholders—suggests to us that the district court ought to have cut, rather than raised by $5,000, the S. E. C.'s proposed award of $45,000. We modify the order below to grant them $40,000.

The Court granted Kresel & Meyerson co-counsel for the Tinker Committee of adjustment mortgage bondholders, an increase of 100% over the S. E. C.'s recommended award of $25,000. Without detracting from the praise Judge Dimock gave these applicants for their assistance, we must

note that he did not disturb the S. E. C.'s finding that they contributed only 1,000 hours of useful nonduplicative work. Viewed in this light the court's award seems indeed generous. We feel that $30 an hour is ample consideration for these applicants' contributions, and we reduce their award to $30,000.

The court also doubled the S. E. C.'s recommended allowance to Charles Poletti; Hoffman, Buchwald, Nadel, Cohen & Hoffman; and Buchman & Buchman on what we feel was an inadequate basis. These applicants, co-counsel to various bondholders, obtained for the estate a commitment as to dividends from Fifth Avenue Coach Lines, purchasers of the reorganized companies. This commitment actually brought to the estate one dividend on the stock paid for the companies amounting to $168,000 and assured the estate that other dividends would not be lost through a delay in the consummation of the plan. We do not feel that the S. E. C. unduly minimized the value of this contribution and hence we reduce this award to $12,500—the sum the Commission recommended.

There remain to be considered the appeal of Hiram S. Gans from Judge Dimock's decision, D. C. S. D. N. Y., 159 F. Supp. 440, disqualifying him from all compensation by virtue of § 249 of the Bankruptcy Act, 11 U. S. C. § 649, and the S. E. C.'s objection to Judge Dimock's refusal to disqualify the firm of Baker, Obermeier & Rosner under the same statute. Gans, an active participant in this proceeding from its inception in August 1948, was counsel to an adjustment bondholders' committee and was instrumental in bringing in Fifth Avenue Coach Lines as purchasers of the reorganized companies. In October 1951 in response to a margin call by his pledgee he sold for $5,271.14 certain Third Avenue bonds which he had owned at the inception of his participation in the reorganization and had pledged in March 1951 along with other securities as collateral for a loan.

Section 249 bars an allowance to any person who while acting in a fiduciary or representative capacity in the reorganization proceedings "has purchased or sold" stock of or claims against the debtor, "or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred." Concededly the power of the court to consent to or approve a transaction extends only to those transactions embraced in the second of the above quoted phrases and does not extend to the first described transfers. **Otis & Co. v. Insurance Bldg. Corp.**, 1 Cir., 110 F. 2d 333. It would seem that any disposal of securities of the debtor pursuant to a pledge arrangement instituted after the applicant had assumed a representative or fiduciary capacity in a reorganization must fall within the class of transactions absolutely prohibited. Sale by the pledgee is of course pursuant to a power of sale granted by the owner; and such a pledge may often operate in practical effect as a "stop loss order"—an order to a broker to sell if the market value of the securities drops below a specific price. If one exercising the perquisites and receiving the benefits of ownership can thus easily avoid the statutory bar by the form chosen for the particular transaction, its deterrent effect is largely dissipated.

Alternatively Judge Dimock's finding that Gans could have met his pledgee's margin call without selling any of the Third Avenue Bonds had he chosen to do so is amply sustained. At that date he was indebted to the pledgee for a total of $21,496 (including $4,296 on a personal note to which this collateral was technically also subject). The value of the other securities pledged as collateral for these loans totaled $17,691.49; it also affirmatively appears in the record that Gans then owned additional Third Avenue Bonds and Mexican Railway bonds of substantial value. Clearly from these resources Gans by further pledge or other sales could have avoided a sale of any of his Third

Avenue securities. Under these circumstances the court could not properly approve the transaction, since the decision to sell was clearly Gans' own, not the pledgee's.

This result may well work harshly in individual cases as here. But in § 249 of the Bankruptcy Act Congress clearly intended drastic results and thought them necessary to eliminate the serious abuses of insider information which had long been existent in equity reorganizations. See 6 Collier on Bankruptcy ¶ 13.18 (1947). In the past excuses of inadvertence or de minimis have not been permitted to undermine the section, and we do not feel we can narrowly constrict it here. Cf. **Otis & Co. v. Insurance Bldg. Corp.**, supra, 1 Cir., 110 F. 2d 333; In re **Norwalk Tire & Rubber Co.**, D. C. Conn., 96 F. Supp. 274, 276.

We reach a similar conclusion as to the disqualification of the firm of Baker, Obermeier & Rosner. The basis on which the S. E. C. urges this disqualification is a sale of $5,000 face amount of Third Avenue adjustment income bonds by the wife of Oscar S. Rosner, the firm's most active participant in the reorganization. Judge Dimock found on undisputed evidence that Mrs. Rosner's decision to sell was based entirely on the advice of her investment broker, and that no inside information possessed by Mr. Rosner entered into the decision. But it also appears that Mr. Rosner not only was fully aware of the contemplated sale, but himself handled the mechanics of the transaction with the broker. The statute § 249 has a very broad sweep applying to stock of the debtor in which "a beneficial interest, direct or indirect, has been acquired or transferred by [the attorney] or for his account, after the commencement of such proceedings"; and facts equivalent to these present here on several occasions have been held sufficient basis for the statutory disqualification. Indeed we know of no actual holdings to the contrary. See **S. E. C. v. Dumaine**, 1 Cir., 218 F. 2d 308, 313-316, certiorari denied **Dumaine v. S. E. C.**, 349 U. S. 929; In re **Midland United Co.**, 3 Cir., 159 F. 2d

340; In re **Central States Elec. Corp.**, 4 Cir., 206 F. 2d 70, 71-72, certiorari denied **Henis v. Egan**, 346 U. S. 899. The language of **Berner v. Equitable Office Bldg. Corp.**, 2 Cir., 175 F. 2d 218, and **Nichols v. S. E. C.**, 2 Cir., 211 F. 2d 412, 416-417, on which the court below relied, is perhaps broader than those decisions warrant. Each case is clearly distinguishable on its facts from the instant situation; and on the reasoning of the above cited decisions we hold that the Rosner firm is disqualified from compensation by the transaction here complained of.

Hence the following awards will be reduced to the sums stated: Saxe, Bacon & O'Shea to $800,000; The Hanover Bank to $30,000; Kelley, Drye, Newhall & Maginnes to $117,500; Edward M. Garlock to $132,500; Harold P. Seligson, Edmund Burke, Jr., and Morton E. Yohalem to $125,000; the Estate of Robert Irving Lennox to $2,500; Murphy, Block, Sullivan & Sawyer to $40,000; Kresel & Meyerson to $30,000; Charles Poletti, Hoffman, Buchwald, Nadel, Cohen & Hoffman, and Buchman & Buchman to $12,500. And affirming the denial of an allowance to Hiram S. Gans, we reverse the award to Baker, Obermeier & Rosner. In other respects the orders are affirmed.

Swan, Circuit Judge (dissenting in part):

I disagree with my brothers' decision as to disqualification of the firm of Baker, Obermeier & Rosner. It is my understanding, as it was Judge Dimock's, that the rule in this circuit is that under § 249 the fiduciary is not disqualified for compensation by transactions in which he had no beneficial interest, and that he is not conclusively presumed to have a beneficial interest in transactions of his wife. Judge Dimock gave the matter very careful consideration. For the reasons stated in his opinion I think the award to Baker, Obermeier & Rosner should be allowed to stand.

In other respects I concur in the opinion of my brothers.

Denial of Petition for Rehearing in the Circuit Court.

UNITED STATES COURT OF APPEALS
for the Second Circuit.

Surface Transit, Inc., et al.,
Appellants,

v.

Saxe, Bacon & O'Shea et al.,
Appellees.

In re Allowance in Estate of Third Avenue
Transit Corporation,
Debtor.

Before Clark, Chief Judge, and Swan and Moore, Circuit Judges.

On Petitions for Rehearing.

Arthur Karger, New York City, for petitioner Estate of Robert Irving Lennox.

Osmond K. Fraenkel, of Hays, St. John, Abramson & Heilbron, New York City, for petitioners Hays, St. John, Abramson & Heilbron.

Oscar S. Rosner and Abraham Altus, of Baker, Obermeier & Rosner, New York City, for petitioner Baker, Obermeier & Rosner, co-counsel for Tinker Committee.

Per Curiam.

Petitions for rehearing denied.

C. E. C.
T. W. S.
L. P. M.
U. S. C. JJ.

June 8, 1959.

APPENDIX C.

Memorandum on Application of Oscar S. Rosner for Compensation.

No. 457.

UNITED STATES DISTRICT COURT,
Southern District of New York.

[Same Title.]

Dimock, D. J.

The S. E. C. recommends disallowance of the claim for compensation of Oscar S. Rosner, one of the attorneys for the Tinker Protective Committee, based on section 249, Chapter X, of the Bankruptcy Act; 11 U. S. C., § 649. Miriam Rosner, wife of the claimant, had purchased in 1945 $5,000 in principal amount of Third Avenue Railway Company Adjustment bonds. On October 21, 1954, while the claimant was acting as attorney for an adjustment bondholders' committee, Mrs. Rosner sold these bonds. The S. E. C. argues that, since the claimant knew of the sale and participated in the mechanics of the transaction, the sale should be treated as his own for purposes of section 249. The claimant states that his wife owned these and other securities in her own right, that she maintained separate bank accounts, and that therefore he had no interest in the property sold or in the proceeds of the sale. He further states that Mrs. Rosner acted on the independent advice of her broker and that he did not advise her as to the purchase or sale of the bonds.

Section 249 provides:

> "Any persons seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the court a statement under oath showing the

claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred."

Under this circuit's interpretation of section 249 and of the similar Rule U-62 (g) (2) of the S. E. C. applicable in proceedings under section 11 (e) of the Public Utility Holding Company Act, 15 U. S. C., § 79k (e), if a purchase or sale by someone other than the claimant is to be a basis for denial of compensation, there must be proof that the claimant had "a beneficial interest, direct or indirect," in the securities purchased or sold. Berner v. Equitable Office Bldg. Corp., 2 Cir., 175 F. 2d 218; Nichols v. Securities and Exchange Commission, 2 Cir., 211 F. 2d 412.

In the Berner case Judge Learned Hand held at page 221 that "* * * the trustee and the S. E. C. had the burden of proving that Berner" (the claimant) "did acquire an interest in Bell's" (the claimant's brother-in-law's) "shares; and that, since they did not succeed in doing so, § 249 does not forfeit Berner's claim to all compensation." The fact that the closer relationship of husband and wife is involved in this case may make the burden of proving the presence of a beneficial interest easier to sustain, but I do not think that it shifts to the claimant the burden of proving its absence.

The Nichols case involved transactions by the wife and daughter of an attorney who was applying for a fee for

services rendered in a proceeding under section 11 (e) of the Public Utility Holding Company Act. The claimant had had no knowledge of the transactions. The court reiterated the Berner rule that under section 249 the claimant may not be disqualified without proof that he had an interest in the securities and suggested no distinction based on the fact that a wife rather than a brother-in-law was involved. The court discussed In re Midland United Co., 3 Cir., 159 F. 2d 340, where the Third Circuit, with one judge dissenting, held that section 249 barred an attorney from compensation where his wife was the purchaser of the securities and where the purchases had been made with his "entire approval and knowledge." The court in the Nichols case remarked that, although not all the decisions were in accord with the Berner case, there was little authority for holding that section 249 applied where the fiduciary was ignorant of his relative's dealings, and concluded, page 418: "In any event, we shall adhere to our own interpretation unless the Supreme Court rules otherwise."

I understand from the Berner and Nichols cases that the rule in this circuit is that, under section 249, the fiduciary is not disqualified for compensation by transactions in which he had no beneficial interest, and that, notwithstanding Securities and Exchange Commission v. Dumaine, 1 Cir., 218 F. 2d 308, 315, to the contrary, he is not conclusively presumed to have a beneficial interest in transactions of his wife.

In the absence of such a conclusive presumption the S. E. C. has not sustained its burden of proving that the claimant had a beneficial interest either in the securities sold or in the proceeds of the sale. He admittedly knew of the sale and participated in the mechanics of the transaction, but these admissions, taken with the evidence of Mrs. Rosner's separately owned securities and separate

bank account, do not warrant an inference that the claimant had a beneficial interest, direct or indirect. Section 249 therefore does not completely forfeit his right to compensation.

Nevertheless, even though a breach of trust does not come within the strict terms of section 249, the court in its discretion may reduce a fiduciary's compensation because of it. Berner v. Equitable Office Bldg., supra. It is the duty of a trustee to deal impartially with all beneficiaries.* If a fiduciary favors one beneficiary with information that is concealed from other beneficiaries and advises this one beneficiary to sell on the basis of the information, he has thereby violated his duty to the other beneficiaries.

When reduction of the claimant's compensation because of his thus favoring of his wife is urged, the question of burden of proof again arises. Where the wife of the fiduciary has sold her share of the trust res, it is even conceivable that there might be a conclusive presumption that he gave her advice on the analogy of the rule in some jurisdictions that a sale by a trustee to his wife is voidable on proof of those facts alone. Scott on Trusts, 2 ed., § 170.6, pp. 1207-08. In view of the express refusal of the Court of Appeals for this circuit in the Nichols case, supra, to say that there is a conclusive presumption of the husband's interest in his wife's share of the res, I reject the suggestion that the mere relationship is enough to conclusively establish that the fiduciary favored his wife. I therefore accept the rule of the courts which say that the relationship is only evidence that the husband has favored his wife. As to whether the burden is upon those who assert favoritism or upon the fiduciary who denies it I find it unnecessary to make a decision. Assuming that the burden is upon the fiduciary I find that the claimant here has sustained it.

* Restatement of Trusts, § 183

Mrs. Rosner had owned the bonds long before her husband became involved in the proceeding as attorney for bondholders. It is true that he knew of her sale during his incumbency as such attorney. Indeed he transmitted the bonds to the broker and received the proceeds although it is clear that he turned them over to his wife. Mr. Kahn, the broker, testified that he advised Mrs. Rosner to sell these and other securities, and that he consulted independently with her, but that the final letter advising of the sale was sent through the claimant and in fact contained advice on other securities belonging to him. While there was thus opportunity for advice to his wife, the claimant states that he did not advise his wife as to the Third Avenue bonds and that he did not disclose to her any information relating to the reorganization proceedings.

Transactions by the wife of a fiduciary require careful scrutiny by the courts to enforce the high standards required by the purpose of section 249, even in cases not within the strict terms of the section and not within its absolute bar to all compensation. Berner v. Equitable Office Bldg., supra, p. 222. I have therefore examined the evidence as to this sale with especial care and I am satisfied that the claimant did not in any way favor his wife with advice as to the sale or with any information as to the reorganization proceedings that would afford her opportunities not open to other beneficiaries.

Because of its recommendation that Mr. Rosner's claim be denied, the S. E. C. has made no valuation of his services. I prefer not to make my award without the advice of the S. E. C. as to its amount and hereby request such advice.

Dated: February 6, 1958.

D. J. Dimock,
United States District Judge.

S.

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BRIEF FOR RESPONDENTS,

SUKHAS TRADING, INC., ET AL.,

IN OPPOSITION TO PETITION

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FILED
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Supreme Court of the United States

OCTOBER TERM, 1959

No. 284

BAKER, OBERMEIER & ROSNER,
Petitioners,
v.
SURFACE TRANSIT, INC., ET AL.,
Respondents.

BRIEF FOR RESPONDENTS, SURFACE TRANSIT, INC., ET AL., IN OPPOSITION TO PETITION FOR CERTIORARI

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Supreme Court of the United States

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No. 284

BAKER, OBERMEIER & ROSNER,
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SURFACE TRANSIT, INC., ET AL.,
Respondents.

BRIEF FOR RESPONDENTS, SURFACE TRANSIT, INC., ET AL., IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

Petitioner, the law firm of Baker, Obermeier & Rosner was counsel for the Tinker Committee, representing Adjustment Mortgage Bondholders of the Third Avenue Transit Corporation in the Chapter X reorganization of the Third Avenue Transit System. Petitioner requests this Court to review the judgment of the Court of Appeals, Second Circuit, which reversed a $7,000 award made by the District Court to that firm. The Court of Appeals denied the award on the ground that Petitioner was disqualified under Section 249 of the Bankruptcy Act (11 U. S. C. § 649; 52 Stat. 901) because: the wife of Oscar S. Rosner, member of the firm, and the firm's most active partici-

pant in the reorganization proceeding, had sold Adjustment Mortgage Bonds of the debtor, while her husband was acting as attorney for the Bondholders Committee.

The Securities and Exchange Commission was a party to the proceeding pursuant to Section 208 of the Bankruptcy Act (11 U. S. C. § 608; 52 Stat. 894). It contended, among other things, that Rosner knew of and participated in the transaction and had a direct or indirect beneficial interest in the sale within the meaning of Section 249 of the Bankruptcy Act.

The District Court disagreed, however, with the recommendation of the SEC, held that Petitioner was entitled to an award, and requested the Commission's recommendation concerning an appropriate amount. The SEC recommended $7,000, and the District Court made an award accordingly.

The reorganized companies appealed to the Court of Appeals from the District Court order awarding and denying final allowances, from the opinion of the Court containing its findings of fact and conclusions of law, and from each and every part of the order and opinion except in so far as the order granted reimbursement for expenses. Thus, contrary to the contention of Petitioner, all specific allowances, including the allowance to Petitioner, were presented to the Court of Appeals for review.

The Court of Appeals, Circuit Judge Swan, dissenting, reversed the order of the District Court with respect to Petitioner, Baker, Obermeier & Rosner, holding it disqualified from compensation under Section 249 of the Bankruptcy Act.

In our brief in opposition to the petition for certiorari (No. 285) of Saxe, Bacon & O'Shea, attorneys for the Trustees, in the reorganization of the Third Avenue Transit System, we have set forth pertinent facts bearing upon the allowances made to 45 claimant committees, individuals and attorneys, aggregating $2,068,000. These background facts are needed for an adequate understanding of the present petition of Baker, Obermeier & Rosner and to avoid needless repetition we respectfully refer the Court to them.

Questions Presented

The questions presented by Petitioner may be set forth somewhat more briefly and in substance, as follows:

1. Whether in a bankruptcy reorganization the SEC may assume the role of an appellant and aggrieved party in alleged contravention of Section 208 of the Bankruptcy Act (11 U. S. C. § 608) where, as Petitioner claims, neither the reorganized companies nor any other party took any position with respect to an allowance by the District Court to the Petitioner;

2. Whether the sale of the Bonds of the debtor corporation for the account of Mrs. Rosner barred the allowance of attorney's fees to Petitioner under Section 249 of the Bankruptcy Act;

3. Whether under Section 249 an applicant for allowances in a reorganization proceeding is, as Petitioner asserts the Court of Appeals held, conclusively presumed to have a beneficial interest in a transaction of his wife; and

4. Whether under Section 249 of the Bankruptcy Act the Court of Appeals had the power to

reverse the award of attorney's fees to Petitioner where the District Court found that Petitioner did not breach his fiduciary obligations.

The Facts

The District Court pointed out that Rosner "admittedly knew of the sale and participated in the mechanics of the transaction." Highly significant, however, is the precise extent of Rosner's knowledge of the transaction, and the precise degree of his participation in the sale—all of which point, with impressive circumstantiality, to a beneficial interest in the sale.

Rosner, through friends, had become well acquainted with Mr. Irving Kahn, a partner in the brokerage firm of J. R. Williston & Co. (A. 411).* They worked together in connection with the administration of an estate of which Rosner was an executor (A. 422-424).

In 1950, Rosner opened a customer's account with J. R. Williston & Co., but the account remained inactive until 1954 (A. 411, 413, 434). In August 1954, pursuant to previous arrangements over the telephone, between Rosner and Kahn, Rosner sent Kahn a brief letter and a list of securities, both in Rosner's handwriting (A. 413-414; A. 435- SEC Ex. B). Rosner wanted Kahn's advice as to what securities to keep and what securities to sell (A. 415-416).

The letter was dated August 25, 1954, and is as follows:

> "Herewith list—which is part my wife—and most mine, at this time—

* Reference: "A."—Appendix to Brief in the Court of Appeals of Appellants, Surface Transit, Inc., et al., the Reorganized Companies.

"Expect a fair load—maybe $100,000 more in the reorg. matter this winter.

"Will talk to you whenever we find it mutually convenient." (A. 435- SEC Ex. B)

The list of securities did not distinguish between Rosner's holdings and his wife's holdings (A. 414-415). It included $5,000 principal amount Third Avenue Adjustment Bonds which had been purchased by Mrs. Rosner in 1945 (A. 417; A. 421; A. 433).

After receiving the list, Kahn made his recommendations in telephone conversations with Rosner, advising him either to sell, keep or switch each security listed (A. 416-417). After receiving Kahn's recommendations, Rosner directed Kahn to sell some of the securities including the Adjustment Income Bonds (A. 419-421). Thereafter, Rosner mailed the Adjustment Bonds to the Williston firm together with the other securities which he had instructed Kahn to sell (A. 420-421). The securities were sent to Williston with a letter of transmittal on the letterhead of Rosner's firm, signed by Rosner (A. 421; A 436- SEC Ex. C-4). The letter stated in part:

"The Third Avenue bonds and Brockway shares should be sold for the account of Miriam R. Rosner, care of my office." (A. 436)

The letter also directed Kahn to sell other securities in Rosner's name.

The Adjustment Income Bonds were sold accordingly on October 21, 1954 while Rosner was attorney for the Bondholders Committee (A. 431-432). A check for the proceeds, payable to Mrs. Rosner, was sent to Rosner's office where a typewritten endorsement was placed upon it. The check was then deposited in Mrs. Rosner's account at Chemical Bank (A. 429, 431).

All correspondence pertaining to the transactions in Mrs. Rosner's name was sent to Rosner at his law office (A. 429) where Rosner maintained a file relating to his wife's investments (A. 433-434).

Kahn spoke with Mrs. Rosner apparently only once, he thinks, in relation to the securities she held at the time (A. 413, 420). Possibly Mrs. Rosner may never have had a formal customer's account with the brokerage firm (A. 412; 432). Thus, both Mr. Kahn and Mr. Utess, bookkeeper of J. R. Williston, testified when asked if that firm had a new account memorandum or signature card for Mrs. Rosner, that searches had been made for such card but none had been found, although all other records relating to sales for her account were produced (A. 412; 432).

Of utmost materiality is the fact that for the year 1954 Mr. and Mrs. Rosner filed a joint Federal income tax return in which they reported under "Capital Gains and Losses" the loss of $684 sustained as a result of the sale of the Third Avenue Adjustment Bonds on October 21, 1954 (A. 434; A. 437). Thus, both Mr. and Mrs. Rosner took a deduction advantage for the long term capital loss, and each received a direct benefit.

POINT FIRST

The SEC did not improperly assume the role of an appellant and party aggrieved as Petitioner contends, in contravention of Section 208 of the Bankruptcy Act.

The appeal taken permitted full representation by the SEC, which was entitled to have all its objections to all allowances, including that to Petitioner, reviewed by the Court of Appeals.

Respondents, the reorganized companies, appealed from the District Court order awarding and denying

final allowances, from the opinion of the Court containing its findings of fact and conclusions of law, and from each and every part of the order and opinion except the part with respect to expenses. Clearly, the appeal presented for decision by the Court of Appeals the propriety of the entire order, and of all the awards made by the District Court, including the award to petitioner, Baker, Obermeier & Rosner.

The SEC, in the District Court, had urged that the facts surrounding the Rosner transaction disqualified Petitioner from any allowance under Section 249 of the Bankruptcy Act. In the Court of Appeals the Commission reiterated that position.

Therefore, the Court of Appeals could review all matters presented and urged by the Securities and Exchange Commission which had appeared in the proceedings in the Court below, and consequently under Section 208 of Chapter X (11 U. S. C. § 608; 52 Stat. 894) was "deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding." This included, of course, the invalidity of the allowance made to Petitioner, which the SEC had urged upon the District Court.

Thus in *Scribner & Miller* v. *Conway*, 238 F. 2d 905 (2 Cir., 1956) the attorneys for a *Bondholders' Protective Committee* appealed from an allowance order of the District Court, and sought an increase of the allowance made to them. No other appeal was taken from the allowance order. But the Securities and Exchange Commission appeared on the appeal, and not only opposed the increase sought by the Bondholders' Protective Committee, but strongly urged upon the Court that the allowances made to other parties were

excessive, and that the SEC's recommendations should have been adopted by the District Court.

The Court of Appeals, Second Circuit, held that the Securities and Exchange Commission could properly urge on appeal its objections to all the allowances made by the District Court, saying (pp. 906-7):

> "The present appeal is taken by the attorneys for the Bondholders' Protective Committee who are primarily seeking an increase in their own allowance, rather than a return to the reorganized corporation; *but this appeal permits of full representation by the S. E. C.*, which had participated in the proceedings below. Bankruptcy Act § 208, 11 U. S. C. § 608; S. E. C. v. United States Realty & Improvement Co., 310 U. S. 434, 458, . . . On this appeal the S. E. C. vigorously supports its original recommendations, committee counsel seek an increase to at least $70,000, and the trustee and his counsel seek to hold the amounts allowed them by the district court." (Emphasis added)

The Court of Appeals agreed with the recommendations by the SEC and reversed the order of the District Court as to all allowances by the Court below, saying (p. 907):

> ". . . the order must be reversed, and upon remand revised to incorporate the allowances recommended by the S. E. C., viz., $70,000 and $130,000 to the trustee and his counsel respectively, in place of the $90,000 and $140,000 allowed, and $50,000 to the appellant as counsel for the Bondholders' Protective Committee, in place of the $45,000 allowed."

The Court of Appeals, Third Circuit, rendered a decision to the same effect in *In re Solar Mfg. Corp.*, 206 F. 2d 780 (3 Cir., 1953).

POINT SECOND

The decision of the Court of Appeals rests upon the facts of this particular case, which convincingly establish that Rosner had an interest in and received benefit from the sale of the debtor's bonds by his wife.

The decision does not, as Petitioner erroneously assumes, rest only upon a conclusive presumption that a husband has an interest in purchases or sales of securities held by his wife.

That the decision of the Court of Appeals, reversing the District Court, rested upon the facts of the particular case, establishing that Rosner did have an interest in and benefited from the sale, is clear. The Court of Appeals said (Pet. App. B 34-35):

> "... The statute § 249 has a very broad sweep applying to stock of the debtor in which a 'beneficial interest, direct or indirect, has been acquired or transferred by [the attorney] or for his account, after the commencement of such proceedings'; and *facts equivalent to these present here* on several occasions have been held sufficient basis for the statutory disqualification. Indeed we know of no actual holdings to the contrary. See *S. E. C.* v. *Dumaine*, 1 Cir., 218 F. 2d 308, 313-316, certiorari denied *Dumaine* v. *S. E. C.*, 349 U. S. 929; *In re Midland United Co.*, 3 Cir., 159 F. 2d 340; *In re Central States Elect. Corp.*, 4 Cir., 206 F. 2d 70, 71-72, certiorari denied *Henis* v. *Egan*, 346 U. S. 899." (Emphasis added)

The Court of Appeals then pointed out that the District Court had cited two cases in support of its decision granting the award: *Berner* v. *Equitable Office Bldg. Corp.*, 2 Cir., 175 F. 2d 218, and *Nichols* v. *S. E. C.*, 2 Cir., 211 F. 2d 412, 416-417. But the Court stated that the language in those two cases is perhaps

broader than those decisions warrant. And the Court distinguished those cases, on the facts, from the instant case, saying (Pet. App. B, p. 35):

> "... Each case is clearly distinguishable on its facts from the instant situation; and on the reasoning of the above cited decisions [Dumaine case, et al.] we hold that the Rosner firm is disqualified from compensation by the transaction here complained of."

We submit that Judge Swan, in his dissent, was in error in assuming that the decision of the majority of the Court of Appeals rested upon the proposition that a fiduciary is "conclusively presumed to have a beneficial interest in transactions of his wife."

POINT THIRD

The Court of Appeals, under its broad appellate powers, had power to reverse the award to Petitioner even though the District Court had found no breach of fiduciary obligations.

The pertinent facts have been set forth *supra*, pp. 4-6. On those facts, and under the pertinent authorities, as we have shown in Point Second, the Court of Appeals held that Rosner had an interest in and received a benefit from the sale of the debtor's bonds by his wife, and Petitioner was, therefore, disqualified from compensation.

Clearly, the Court of Appeals did not agree with the District Court's interpretation of the facts, and with the erroneous legal conclusion predicated thereon. Under such circumstances, reversal of the District Court was clearly proper, and within the appellate powers of the Court. In this connection we respectfully

refer the Court to our brief, Point First, II, pp. 4-5, in opposition to the petition for certiorari (No. 384) of Edward M. Garlock, co-counsel for petitioning creditors; in which we deal with the broad appellate powers of the Court of Appeals over allowance orders and other orders in bankruptcy proceedings.

POINT FOURTH

No questions of general or public importance meriting review by this Court are here involved and the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: New York, N. Y.
October 1, 1959

Office-Supreme Court, U.S.
FILED
OCT 13 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 284.

BAKER, OBERMEIER & ROSNER,
Petitioners,
v.
SURFACE TRANSIT, INC., et al.,
Respondents.

BRIEF

Of Petitioners in Response to Briefs for Respondents Surface Transit, Inc., et al., and for the Securities and Exchange Commission.

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St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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BRIEF

Of Petitioners in Response to Briefs for Respondents, Surface Transit, Inc., et al., and for the Securities and Exchange Commission.

STATEMENT.

The briefs of the respondents, Surface Transit, Inc., et al., and the Securities and Exchange Commission (herein called "the SEC") disclose no dispute, and there is none, as to the facts found by the District Judge after full and fair hearings, including the taking of proof by and before the SEC.

Indeed, the opinion of the United States Court of Appeals for the Second Circuit accepts the facts as found by the District Court, but, nevertheless, improperly reversed the lower Court on what petitioners believe to be a misconstruction and misapplication of Sec. 248 of the Bankruptcy Act (11 U. S. C. § 648), and that Circuit's own rulings.

Since the SEC filed only one brief in opposition to the Petition in No. 284 (this Petition) and in opposition to No. 382, we feel constrained to point out that not alone are the facts in both entirely different but the findings and conclusions of the District Judge are also different.

After extensive and exhaustive hearings conducted and held by the District Court, Judge Dimock awarded the petitioners herein the sum of $7,000.00, which award was reversed by the Circuit Court. In the Gans case, Petition No. 382, the District Court denied an award; which denial was affirmed by the Circuit Court. The only similarity between the two situations is that the SEC opposed any award being made to either petitioner and as authority and justification for its position in both instances relied on Sec. 249 of the Bankruptcy Act. Otherwise, the petitions under No. 284 and No. 382 are completely dissimilar in all respects.

While petitioners recognize that the Bankruptcy Act, Sec. 208 (11 U. S. C. Sec. 608), permits the SEC to be heard on all matters arising in the proceedings, the right to appeal has been expressly denied the Commission by this section. Where appeals are taken by parties to the proceedings who are permitted the right to appeal, unquestionably the SEC may be heard on all of the issues raised by the parties. Where, however, on an appeal no issue is raised by any of the parties—whether they be appellants or appellees—as to the propriety of an award of counsel fees, the SEC cannot arrogate unto itself the right to become an appellant denied it by statute, and thereby raise issue not otherwise before the Appellate Court.

The respondent reorganized companies, and the SEC rely upon the Scribner & Miller v. Conway case, 238 F. 2d 905 (2 Cir. 1956), and the reorganized companies further rely upon the case of In re Solar Mfg. Corp., 206 F. 2d

780 (3 Cir. 1953), for the proposition that where an appeal has been taken there may be "full representation by the Securities and Exchange Commission". While we agree with the statement, neither case sustains their contentions.

The Scribner & Miller case (supra) involved a corporate reorganization proceeding where the District Court entered an order making allowances for services rendered and counsel for a bondholders committee appealed seeking an increase in the allowances. On appeal, the SEC vigorously supported the original recommendations which were not followed by the District Court. The Court of Appeals, in its opinion appearing on page 906, in discussing the role of the SEC on the appeal, quite correctly stated the above rule that "this appeal permitted a full representation by the SEC, which had participated in the proceedings below. Bankruptcy Act, Sec. 208, 11 U. S. C. 608." In reversing the District Court, the Court of Appeals felt that the recommendations of the SEC should be followed insofar as the evaluation of the services rendered. This is not the situation in the case at bar.

In the proceedings herein, the SEC in its interpretation of Section 249 of the Bankruptcy Act (11 U. S. C., § 649), concluded that the petitioners herein were barred from compensation under said section. However, when the District Court concluded that the facts as found by it as a matter of law did not constitute a violation of that section, and since the SEC had made no evaluation of the services rendered by the petitioners, the District Court preferred not to make any award without the advice of the SEC as to the amount of the award and requested such advice from the Commission. The SEC then recommended the sum of $7,000 which the District Court awarded petitioners. This is quite different from the Scribner & Miller v. Conway case (supra), where, after

recommendations made by the SEC as to the valuation of the services rendered, the District Court disregarded the recommendations and made its own awards.

Similarly, the case of In re Solar Mfg. Corp. (supra), involved a situation where three appeals were taken by attorneys who were disappointed with the fees allowed them by the District Court for the services rendered in a Chapter X proceeding of the debtor. The SEC took the position that the awards as a whole were grossly excessive and arbitrary in that the trustees and their counsel were treated too generously. Again, in that case, the issues as to the amounts were raised by parties to the proceedings who were unhappy because of the fees allowed them. Thus, the SEC quite correctly was permitted to be heard. This bears no semblance of resemblance upon examination to the case before the Court in these proceedings, as no party to the proceedings had raised on the appeal itself any objection as to the right to an award or to the award made to the petitioners herein.

In the case at bar, the SEC alone made known to the Circuit Court its objection to the propriety of the granting of an allowance to the petitioners. Thus, surely the SEC, and not the respondents, Surface Transit, Inc. et al., became an appellant, a role expressly denied to it under Sec. 208 of the Bankruptcy Act (11 U. S. C., Sec. 608).

CONCLUSION.

The questions presented are questions of importance. A fiduciary, whether an attorney or member of a creditors committee, may find himself in a position, as did Oscar S. Rosner, a member of the petitioners' firm, where he is either unable or, as in this instance, properly unwilling to deny a relative by marriage or otherwise of a lawful right to acquire or sell securities. A fiduciary may be wholly unaware of the acquisition of securities of a com-

pany in reorganization or despite an awareness is unable to prevent an individual or member of his family from purchasing or selling a security. The Courts below, with progressive economic national growth, become more and more the havens for bankruptcy reorganizations. The Courts below are in need of guidance as to fiduciaries who serve as counsel to creditors groups and members of committees for such creditor groups.

This Court, we pray and submit, should speak with authority in the construction and interpretation of Section 249 of the Bankruptcy Act (11 U. S. C., Sec. 649).

The petition for a writ of certiorari in No. 284 should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 284

BAKER, OBERMEIER & ROSNER, PETITIONERS

v.

SURFACE TRANSIT, INC., ET AL.

No. 382

HIRAM S. GANS, PETITIONER

v.

SURFACE TRANSIT, INC., ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT[1]

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Rosner 27-

[1] These petitions are two of five directed to the judgment entered by the Court of Appeals for the Second Circuit on May 11, 1959, with respect to fee allowances in the reorganization under Chapter X of the Bankruptcy Act of Third Avenue Transit Corporation and subsidiary debtors. The other petitions, Nos. 285, 374 and 384, are the subject of two separate briefs of the Securities and Exchange Commission in opposi-

35)[2] is reported at 266 F. 2d 862. The opinion of the District Court dealing with the issues raised by the petition in No. 284 (Rosner 37–41) is not reported; the opinion of the District Court dealing with the issues raised by the petition in No. 382 (pp. 13–18, *infra*) is reported at 159 F. Supp. 440.

JURISDICTION

The judgment of the Court of Appeals was entered on May 11, 1959. A petition for rehearing filed by petitioners in No. 284 was denied on June 8, 1959 (Rosner 36). Petitioner in No. 382 obtained an order dated August 6, 1959, extending his time to file a petition for certiorari until September 9, 1959. The petition in No. 284 was filed on August 7, 1959, and the petition in No. 382 on September 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether Section 249 of the Bankruptcy Act prohibits the award of a fee from the debtor's estate:

1. (No. 382) to an attorney representing a public bondholders committee who pledged his bonds of the debtor, after assuming to act for the committee, and subsequently sold them during the reorganization to meet the pledgee's margin requirements, and

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tion. The Commission was a party to the reorganization proceedings pursuant to Section 208 of the Bankruptcy Act (11 U.S.C. 608).

[2] "Rosner" refers to the petition in No. 284; "Gans" to No. 382. "A. —" refers to the separately bound appendix filed by the reorganized companies in the Court of Appeals. "Gans A. —" refers to the appendix filed by Gans in the Court of Appeals.

2. (No. 284) to an attorney representing a public bondholders committee who assisted his wife in selling her bonds of the debtor during the reorganization.

STATUTE INVOLVED

Section 249 of the Bankruptcy Act, as amended, 52 Stat. 901, 11 U.S.C. 649, provides:

> Any persons seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred.

STATEMENT

Hiram S. Gans, petitioner in No. 382, was counsel to an adjustment bondholders' committee which participated in the reorganization of Third Avenue Transit Corporation and subsidiary corporations. Subsequent to becoming counsel to the committee, he pledged $25,000 face amount of his holdings of Third Avenue adjustment income bonds, together with

other securities, as collateral for a loan. Thereafter, and while he was still the attorney for the committee, he directed the sale of these securities to meet a margin call by his pledgee. He had sufficient other resources at this time so that, by further pledge or sales of other securities, he could have avoided the sale of his Third Avenue bonds. (*infra*, pp. 14, 17; Gans 29). Both courts below held that in these circumstances Section 249 of the Bankruptcy Act precluded the award of any fee from the estate to this petitioner, and that the district judge had no discretion to give subsequent approval to the transaction to avoid the bar of that section.

Petitioners in No. 284 are a law firm which participated in the debtor's reorganization primarily through its partner, Oscar S. Rosner,[3] as co-counsel for another committee for Third Avenue adjustment bondholders. During this period, Rosner's wife sold $5,000 principal amount of Third Avenue adjustment bonds upon the advice of an investment broker. Rosner was fully aware of the contemplated sale and handled the mechanics of the transaction with the broker (Rosner 34, 39).[4] The district judge, noting that no inside information possessed by Rosner en-

[3] Petitioners' application in the District Court, page 21, stated:

"Petitioner represents that no person other than Oscar S. Rosner will receive any sum which this Court may allow, except that out of any allowance that may be granted by this Court 10% thereof will be paid to Melvin L. Krulewich, Esq., an office associate and a member of the New York Bar, because of the services he rendered during the early stages of petitioner's activities in these proceedings."

[4] Some conversations leading to the decision to sell the Third Avenue securities were had between Rosner and the broker

tered into his wife's decision to sell and that she separately owned the securities and maintained a separate bank account,[5] held that Rosner's right to compensation was not precluded by Section 249 awarding him $7,000. The Court of Appeals granted the petition of the reorganized companies, which under the plan were required to pay all fees, for leave to appeal "from each and every part of said order"[6] and, on appeal, reversed the district judge's ruling with respect to Rosner, as being an unduly restrictive interpretation of the statute.

ARGUMENT

1. Section 249 of the Bankruptcy Act was designed to insure that fiduciaries in a reorganization proceeding faithfully discharge their trust uninfluenced by personal considerations. It deals with an evil which had been long prevalent in reorganizations—trading in securities of debtor corporations on the part of members of committees and other persons in representative capacities who might "gain tremendous advantages."[7] In view of the obvious difficulties which would attend

(A. 419–420). Rosner, who maintained some of his wife's investment files in his office, received and endorsed the check from the broker, depositing it in his wife's account (A. 431, 433–434).

[5] A credit for the long-term capital loss resulting from the sale of these securities was taken in the joint tax return filed by Rosner and his wife (A. 437).

[6] Petition of appeal, Surface Transit, Inc., et al., C.A. 2, No. 25, 474, p. 22.

[7] See Hearings before the House Committee on the Judiciary on H.R. 8046, 75th Cong., 1st Sess. (1937), p. 184. See also SEC Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part II, Committees and Conflicts of Interest (1937), p. 513. This study, which led to the adoption

the enforcement of a rule requiring proof of the misuse of a fiduciary position through transactions in securities of a company undergoing reorganization, this section was enacted as a "rule of thumb."[8] Accordingly, consonant with the prophylactic purposes of the statute, courts have construed the section, in the words of the court below, to have "a very broad sweep" (Rosner 34).[9]

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of Chapter X, commented on the dangers resulting from traffic by fiduciaries in securities of a company undergoing reorganization, as follows:

"* * * The almost irresistible urge will be for him to buy in light of impending 'bullish' developments or to sell against proposed 'bearish' announcements. These developments or announcements frequently will be under the control of the committee. Or the committee may learn of them as a result of its activity. Whatever their origin, the result is that committee members will frequently be placed in a position to trade more advantageously than the persons for whom they act as trustees or fiduciaries, and from whom they are buying or to whom they are selling. Thus it is that a conflict between these fiduciaries and their beneficiaries arises. It is nonetheless a conflict even though, as subsequent events transpire, the committee members may lose rather than gain on the transaction."

[8] See statement of Commissioner (now Mr. Justice) Douglas in Hearings on H.R. 8046, *supra*, p. 184:

"* * * We started to set this up in another way, to say that if a person in a fiduciary capacity uses inside information to purchase or sell securities, then he shall be penalized, but we got into a lot of difficulties. We visualized a lot of administrative difficulties in determining in a particular case whether or not actual inside information was used, and so we decided that the best practical way of doing it was to broaden the base a little bit and establish a rule of thumb * * *."

[9] See, *e.g.*, *In re 188 Randolph Building Corp.*, 151 F. 2d 357 (C.A. 7) (single transaction); *Otis & Co.* v. *Insurance Building Corp.*, 110 F. 2d 333 (C.A. 1) (good or bad faith, profit or loss, immaterial); *In re Norwalk Tire & Rubber Co.*, 96 F. Supp. 274, 276 (D. Conn.) (inadvertence of clerk no excuse);

Underlying both petitions is the contention that the application of Section 249 resulted in harsh and unfair treatment to these petitioners. That argument is not novel. But, as the Court of Appeals said, "in Section 249 of the Bankruptcy Act Congress clearly intended drastic results and thought them necessary to eliminate the serious abuses of insider information which had long been existent in equity reorganizations" (Rosner 34, Gans 30). The statute, in terms and in purpose, applied to both of these petitioners, and the court below followed the Congressional mandate.

2. Since it was expressly found by both the District Court (*infra*, pp. 14, 17) and the Court of Appeals (Gans 29) that Gans, petitioner in No. 382, could have met his pledgee's "margin call" without selling any of his Third Avenue Bonds, "had he chosen to do so," [10] the sale of these bonds was clearly voluntary. Accordingly, the Court of Appeals did not have to go any further in determining that the bar of Section 249 was applicable to his case.

In holding, however, that "any disposal of securities of the debtor pursuant to a pledge arrangement instituted after the applicant had assumed a representative or fiduciary capacity in a reorganization must fall

In re Arcade Malleable Iron Co., 35 F. Supp. 461, 462 (D. Mass.) (purchase of two bonds).

[10] At the time of the sale of the debtor's bonds, the aggregate market value of all securities pledged with the bank, other than the adjustment income bonds was, as found by the District Court, $17,691.49. The collateral loan was $17,200. (See p. 14, *infra*.) At that time, Gans also held $11,000 face amount of Third Avenue bonds, as well as other securities, as yet unpledged, which he was free to post as additional collateral (Gans A. 35, 60, 61).

his wife with his knowledge, since a fiduciary normally maintains such a "beneficial interest" in the financial transactions of his spouse that it could influence his activities and conduct."[14]

Petitioners incorrectly seek to find a conflict with two other decisions of the Second Circuit below: *Nichols* v. *Securities and Exchange Commission*, 211 F. 2d 412, and *Berner* v. *Equitable Office Building Corp.*, 175 F. 2d 218. Of course, an intra-circuit conflict of this type is not a conflict of circuits for certiorari purposes. See *Wisniewski* v. *United States*, 353 U.S. 901. But in any event there is no conflict. The *Nichols* case, involving an interpretation of Rule U–62(g)(2) (17 CFR 250.62(g)(2)) promulgated under the Public Utility Holding Company Act of 1935, which is analogous to Section 249, held that two members of a committee were entitled to compensation despite the fact that the wife and daughter of one member and a sister of another member purchased and sold shares of the company undergoing reorganization. The court, however, emphasized that neither member of the committee had any knowledge of the purchases and sales involved (211 F. 2d at 418). Rosner not only had knowledge of his wife's transaction, but assisted therein (*supra*, pp. 4–5). In the

[14] "* * * as a practical matter an economic benefit to a wife is indirectly an economic benefit to a husband, at least when husband and wife are living together as a family unit, and * * * when a wife with her husband's knowledge trades in a stock represented by a committee of which the husband is a member, the husband cannot possibly be as disinterested in his role of committee member as one in a fiduciary capacity ought to be. Cf. *Helvering* v. *Clifford*, 1940, 309 U.S. 331, 335–336." *S.E.C.* v. *Dumaine*, 218 F. 2d 308, 315 (C.A. 1).

Berner case, the question was whether an attorney for stockholders had forfeited his allowance because upon his "advice and consultation" his brother-in-law had dealt in the securities of the debtor. It was held that the attorney had not been shown to have acquired an interest in his brother-in-law's shares, and that Section 249 did not, therefore, require a forfeiture of his claim to all compensation. The difference in relationship and economic benefit afford a complete answer to the claim that that case is in conflict with the decision below.

4. Petitioners in No. 284 also urge that the question of their fee was not properly before the Court of Appeals, since in their view the reorganized companies took no position on the fee, and the Securities and Exchange Commission improperly assumed the role of appellant (Rosner 6). As noted *supra*, p. 5, the order of the District Court of July 22, 1958, dealt with all applications for final fees arising out of the reorganization proceeding, and the petition of the reorganized companies, which was granted without restriction, sought leave to appeal "from each and every part of said order." Also, that petition specifically urged that the District Court had failed to comply with Section 249[15] and Rosner's was the only fee

[15] See Petition of Appeal, Surface Transit Inc., et al., C.A. 2, No. 25,474, p. 10;

"Petitioners seek leave to appeal upon the ground that the District Court failed to observe and apply the principles governing allowances of fees and disbursements in corporate reorganizations as set forth in Sections 241, 242, 243 and 249 of the Bankruptcy Act (11 U.S.C. §§ 641, 642, 643 and 649) as interpreted by this Court in *Finn v. Childs Co.*, 181 F. 2d 431 (1950), and in other cases."

granted by the District Court as to which a question with regard to that Section had been raised.[16] Moreover, in review of allowance orders the appellate court is not confined to the specific parts of the order appealed from, and where an appeal has been taken there may be "full representation by the Securities and Exchange Commission." *Scribner & Miller v. Conway*, 238 F. 2d 905, 906 (C.A. 2).

CONCLUSION

The holdings below with respect to these petitioners were correct, and there is no conflict. The petitions for writs of certiorari should be denied.

Respectfully submitted.

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[16] In the Memorandum of Securities and Exchange Commission re Applications for Leave To Appeal from Order on Final Allowances, it was specifically stated (p. 5) that, should the application be granted, the Commission would urge that the award to Rosner should be reversed on the ground that he was "disqualified by virtue of the sale of securities by his wife with his knowledge."

APPENDIX

IN THE MATTERS OF THIRD AVENUE TRANSIT CORPORATION, SURFACE TRANSPORTATION CORPORATION OF NEW YORK, WESTCHESTER STREET TRANSPORTATION COMPANY, INC., THE WESTCHESTER ELECTRIC RAILROAD COMPANY, WARONTAS PRESS, INC., DEBTORS

United States District Court, S.D. New York, Feb. 6, 1958

DIMOCK, District Judge.

Hiram S. Gans, counsel to the Lowell H. Brown Committee of Holders of Third Avenue Railway Company Adjustment Mortgage 5% Income Bonds, has petitioned, under Section 243 of the Bankruptcy Act, 11 U.S.C. § 643, for compensation in the amount of $325,000 for services in that capacity and has applied for approval, under section 249, 11 U.S.C. § 649, of a sale of $25,000 principal amount of those bonds for his account on October 23, 1951. The S.E.C. recommends denial of both applications.

Section 249 provides:

> Any persons seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or reimbursement shall be al-

lowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred.

The claimant pledged the Third Avenue bonds in question as collateral for a bank loan in March, 1951. On October 23, 1951, the date of the sale, claimant's secured loans totaled $17,200 and his collateral totaled $22,941.49, an amount which failed in a slight degree to meet the requirement of the bank that the value of the collateral should be such that the loan should not exceed 70% of it. The bank demanded either a reduction of the loan or additional collateral. It expressed concern over the quality of the collateral, particularly the Third Avenue bonds which had declined in value from $7,343.75 on March 22, 1951 to $5,250 on October 19, 1951. The claimant thereupon requested the bank to forward the Third Avenue bonds to his broker for sale and requested his broker to forward the proceeds of the sale directly to the bank. Thereby the loan was reduced by the proceeds of sale, $5,250. The claimant could have avoided sale of the Third Avenue bonds if he had sold all of the other pledged securities, valued on the date of sale at $17,691.49. That sum would have paid the loan in full and left the claimant the owner of the bonds. Claimant has argued that a forced sale of the bonds would have been inevitable if he had not sold them; but that argument is not supported by facts.

The second sentence of section 249 disqualifies a claimant for compensation in two classes of transactions in securities of the debtor:

1. If the securities have been purchased or sold by the claimant.

2. If the securities have been otherwise acquired or transferred by the claimant or for his account.

In the second class of transactions the claimant is disqualified only if the acquisition or transfer is without the prior consent or approval of the judge.

The first class is the simplest case: a purchase or sale where the claimant acts. It is evident that if the statute is applied literally the transaction under consideration falls within the first class and Mr. Gans is disqualified. The bonds were sold on his order and therefore they were sold by him.

If the transaction was one within the first class, the prior consent or subsequent approval of the judge will not avert disqualification. *Otis & Co.* v. *Insurance Bldg. Corp.*, 1 Cir., 110 F. 2d 333. The court cannot disregard the prohibition merely because it finds that a sale by the claimant within the first class was made in good faith, *Otis & Co.* v. *Insurance Bldg. Corp., supra,* or that the sale was not fraudulent or made with intent to avoid the statute by subterfuge, *In re Reynolds Investing Co. Inc.*, 3 Cir., 130 F. 2d 60, or that hardship would result from a denial of compensation, *In re Norwalk Tire & Rubber Co.*, D.C. D. Conn., 96 F. Supp. 274.

The transaction falls within the second class if the securities have been acquired or transferred by the claimant or for his account otherwise than where they have been purchased or sold by him. The description in the statute, "otherwise acquired or transferred",

refers back to the first class and therefore is to be construed as if it read "acquired or transferred otherwise than where the securities have been purchased or sold by the claimant". Thus a transaction will fall within this description (a) if it is not a purchase or a sale or (b) even though a purchase or a sale, if it is not a purchase or sale *by the claimant* but is merely for his account without any action by him.

Taking up group (a), an illustration of an acquisition by the claimant otherwise than a purchase would be furnished by a bequest to him. When the legislation was in Congress that was cited as a case where the judge was to be given the power to avert disqualification of the claimant.[1] An illustration of a transfer by the claimant otherwise than a sale would perhaps be furnished by a gift by him. The transfer in this case, however, was clearly a sale.

Passing to group (b), can it be said that the Third Avenue bonds, though sold, were not sold by the claimant but were sold for his account by some one else? If so, I have the power to approve the transaction.

A sale, not by the claimant but made for his account by some one else, can best be exemplified by a sale by a pledgee for the account of the claimant but in which the claimant takes no part. I have no doubt that the statute, in permitting relaxation of its rigor where the transfer was for the account of the claimant but was not a sale by him, contemplated, among other situations, a sale by a pledgee. It would seem unfair to penalize the claimant if all that had happened was that he had been unable to pay a loan secured by a

[1] See hearings before a Subcommittee of the Senate Committee on the Judiciary on H.R. 8046, 75th Cong., 2nd Sess. 80, 81.

pledge of the securities and that the pledgee had therefore sold them for the claimant's account. Under the letter of the statute a judge could approve that transfer and thus avert the forfeiture.

Perhaps the statute could be so liberally construed that, if eventual sale by the pledgee were inevitable, a sale on order of the claimant could be treated as a transfer "for the account of", but not a sale "by", the claimant and thus a transfer which court approval would eliminate as a bar to compensation. Judge Peters in *Otis & Co.* v. *Insurance Bldg. Corp., supra,* refers at p. 335 of 110 F. 2d to the disqualifying transactions as the usual "voluntary" purchases and sales.

In this case, however, I cannot escape the fact that a sale of the remaining collateral by the claimant would have avoided a sale of the Third Avenue bonds by the pledgee. Their sale by the pledgee was not inevitable.

Circumstances creating financial hardship in the retention of the securities, no matter how appealing, cannot be ground for holding their sale on the order of the claimant to have been, not a sale by him, but merely a transfer for his account. To reach that result the circumstances must be such as to force their sale. I must therefore deny the application for approval and with it the application for compensation.

This result is nothing short of tragic. I agree with counsel for the S.E.C. who says that Mr. Gans participated to a principal extent in the most significant single contribution to the entire case. It was Mr. Gans, who, after others had failed in the attempt, succeeded in interesting Fifth Avenue Coach Company which took over the Third Avenue System and thus made the success of the reorganization possible. I am convinced that such was the claimant's interest

in his work for his clients, as distinguished from his interest in his own compensation, that he was completely oblivious to the provisions of section 249 at the time that he sold the bonds. I believe him when he says that he was "rattled" by the margin call. I can think of no information about the situation which was in his hands at that time which was not available to any security holder. Such inferences as may be drawn would indicate that his connection with the proceedings would have led him to buy rather than sell if he had been of a mind to speculate on inside information. He sold his bonds at about 21 and then proceeded to put in efforts on behalf of the reorganization which pre-eminently, among the efforts of all the others, resulted in the appreciation of the market value of the bonds to about 38.

Nevertheless Congress, in its wisdom, has tied the hands of the courts. So strong is the public policy against dealings by persons engaged in the reorganization of a corporation in the securities of that corporation that the courts are not allowed to remunerate from the estate one of them who buys or sells any of those securities. No amount of benefit conferred upon the estate by a claimant can be permitted to make up for a single harmless false step taken innocently in a time of stress.

As suggested by counsel for the S.E.C., the disbursements made by Mr. Gans, as far as possible, will be treated as disbursements by the Committee and will be paid to the Committee for use in reimbursing Mr. Gans.

U.S. GOVERNMENT PRINTING OFFICE: 1980